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SUPREME COURT, U.S.

No. 06-1509

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL H. BOULWARE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE UNCERTAINTY IN DECISIONS OVER THE EFFECT OF STATE COURT JUDGMENTS IN FEDERAL TAX CONTROVERSIES IS SQUARELY PRESENTED.

The government does not dispute that the effect of a state court judgment in a federal tax case is--to use the court of appeals' word--"unclear" under this Court's decisions. App. 40.[1] It argues instead that this case does not present that question. According to the government, the only issue here involves the "scope of the state-court judgment" under Hawaii law. Opp. 10.

The government's argument overlooks what occurred at the retrial. The district court specifically instructed the jury, over Boulware's objection, ER 807-09, that the state court judgment "is not binding on you." App. 25. The government emphasized this point in its rebuttal argument; it told the jury that the state court judgment "doesn't determine anything at all for you, ladies and gentlemen." Tr., Vol. 10, at 200. In upholding the district court's instruction on Boulware's second appeal, the court of appeals declared that it had "rejected Boulware's argument that [the judgment] was controlling on the issue of whether the money held by Lee belonged to HIE and was therefore not taxable to him." App. 11. In light of the district court's jury instruction, the government's rebuttal argument, and the court of appeals' decision, the question of the effect to be given a state court judgment determining property rights--binding, *Aquilino v. United States*, 363 U.S. 509, 512-13 (1960), or merely "proper regard," *Commissioner v. Estate of Bosch*, 387 U.S.

[1] Brief for the United States in Opposition at 9-10 ("Opp.").

456, 464 (1967)--is squarely presented. The Court should grant the writ to resolve that important issue, which has caused enormous confusion in the courts of appeals.

II. THE CONFLICT IN DECISIONS OVER APPLICATION OF THE RETURN OF CAPITAL RULE IN CRIMINAL CASES IS SQUARELY PRESENTED.

The government acknowledges the clear split between the Second and Ninth Circuits on the return of capital defense. Opp. 13. It contends, however, that this case is not an appropriate vehicle to resolve that split "because petitioner cannot prevail under either approach." Opp. 15. This is so, according to the government, because Boulware's receipt of funds from HIE was "unlawful." Opp. 15-18.

The government's argument--which it never raised before the district court or the court of appeals panel--misses the mark. Regardless of whether there is an "unlawful diversion" exception to the return of capital rule, no court or jury, state or federal, has determined that Boulware unlawfully diverted the funds at issue from HIE. The issue has never been litigated.[2] The government's eleventh-hour allegation that the transfers from HIE to Boulware violated the law should not dissuade the Court from resolving the circuit split on an important and recurring issue. The Court should address the "contemporaneous intent" issue that has

[2] The government's reliance on Boulware's conspiracy to make false statements conviction from the first trial is misplaced. Opp. 17. That conviction establishes at most that Boulware conspired to obtain funds unlawfully from a federally insured financial institution through false statements to the institution. It does not establish that Boulware unlawfully diverted funds from HIE, which is the key issue under the exception to the return of capital rule that the government posits.

divided the Second and Ninth Circuits and leave to the lower courts on remand the "unlawful diversion" question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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